Supreme Court, U.S.
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No. 92-966

In the Supreme Court of the United States

OCTOBER TERM, 1992

M. MAUREEN POLSBY, PETITIONER

v.

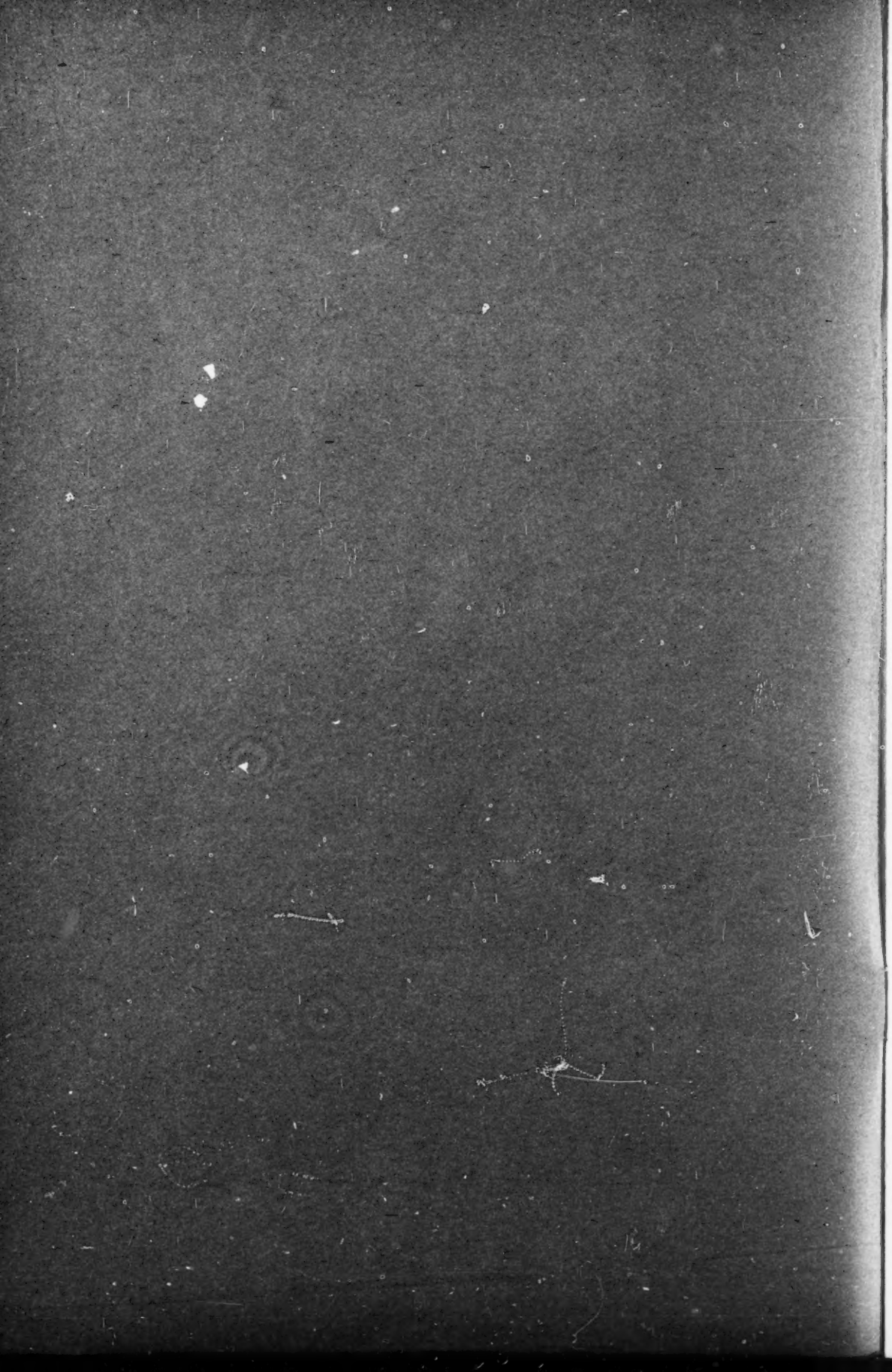
DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether Title VII's provision barring an employer from "discriminat[ing] against any of his employees or applicants for employment * * * because he has made a charge * * * under [Title VII]," 42 U.S.C. 2000e-3(a), protects individuals against retaliation that occurs after they leave the employer's service.

2. Whether the lower courts correctly ruled that petitioner failed to establish that her employer violated its obligation under 29 C.F.R. 1613.214(a) (1985) to notify her of the 30-day time limit for contacting an Equal Employment Opportunity counselor in connection with a claim of employment discrimination by a federal agency.

3. Whether the lower courts correctly ruled that petitioner was not entitled to equitable tolling of the deadline for pursuing her charge of employment discrimination.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 970 F.2d 1360. The opinion of the district court (Pet. App. 31a-37a) is unreported. Related opinions of the district court (Pet. App. 22a-25a, 26a-30a) also are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1992.[1] The court of appeals denied a petition for rehearing on September 8, 1992. Pet. App. 19a-21a. The

[1] The court of appeals issued an amended opinion on August 12, 1992. Pet. App. 1a-18a.

petition for a writ of certiorari was filed on December 7, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner held a two-year medical fellowship at the National Institute of Neurologic and Communicative Disorders and Stroke of the National Institutes of Health (NINCDS) from 1983 to 1985. Pet. App. 2a-3a, 32a. This case arises out of her allegations that she suffered employment discrimination on two occasions in connection with that employment.

a. In June 1985 petitioner was informed that her contract would not be extended for an additional year. She consulted a person whom she erroneously believed to be an Equal Employment Opportunity (EEO) counselor about her belief that her supervisor Dr. Thomas Chase had discriminated against her on the basis of sex; that person did not inform her that 29 C.F.R. 1613.214(a)(1)(i) (1985) required her to present such a claim to an EEO counselor within 30 days.[2] She also consulted an attorney, who incorrectly advised her that she had six months to take action. Petitioner left her employment at NINCDS in July 1985 without consulting an EEO counselor.[3] Pet. App. 2a-3a, 32a.

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[2] Effective October 1, 1992, 29 C.F.R. 1613.214 was revised; the corresponding provision, which will appear at 29 C.F.R. 1614.105(a), extends the time limit to 45 days. 57 Fed. Reg. 12,648 (1992).

[3] The EEO officer assigned to NINCDS at the time filed an affidavit in the district court explaining the agency's efforts to promote awareness of the opportunities for redress available under Title VII:

> posters encouraging all employees who felt that they were the victims of discrimination on the basis of * * * sex * * * to contact an EEO Office or an EEO officer or an EEO counselor were prominently displayed in numerous locations in the Clin-

On December 13, 1985, petitioner complained to an EEO counselor that she had experienced sex discrimination at NINCDS. The counselor noted that petitioner's complaint "was initiated more than 30 days after the alleged discrimination," but stated that counseling would proceed "and the timeliness of the complaint would be determined by the [HHS] if a formal complaint is filed." Petitioner filed an administrative complaint in January 1986. Pet. App. 3a.

b. On December 24, 1985, petitioner asked Dr. Mark Hallett, one of her supervisors at NINCDS, for a letter describing her training there, in support of her application for certification by the American Board of Psychiatry and Neurology. Dr. Hallett, who was not then aware of petitioner's December 13 complaint against Dr. Chase,[4] wrote the letter on the same day. The letter described the program in which petitioner had been involved and indicated that it would not justify a year's credit toward residency requirements. Petitioner unsuccessfully asked Dr. Hallett to alter that statement and offer the residency credit. On February 19, 1986, fifty-seven days after Dr. Hallett wrote the letter in question, petitioner amended her administrative complaint to include the allegation that Dr. Hallett's letter constituted retaliation for her EEO complaint. Pet. App. 3a, 10a.

2. The Department of Health and Human Services issued a proposed disposition of petitioner's complaint on March 1, 1988. C.A. App. 55-74. It reviewed petitioner's contentions in detail and concluded that neither Dr.

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ical Center. These posters contained photographs of EEO officers and counselors, their locations and telephone numbers. C.A. App. 693-694.

[4] Dr. Hallett did not learn of the complaint until December 31, 1985, when an EEO counselor contacted him. C.A. App. 289.

Chase nor Dr. Hallett had discriminated against her on the basis of sex. *Id.* at 59-71. The agency adopted the proposed disposition as its final disposition on July 11, 1988. C.A. App. 75-77.

3. Petitioner then filed suit in the United States District Court for the District of Maryland, challenging the government's disposition of her Title VII claims. The district court rejected petitioner's claims and granted summary judgment for the government. Pet. App. 31a-37a. The court noted that it was uncontested that petitioner had failed to comply with her obligation under 29 C.F.R. 1613.214(a)(1)(i) (1985) to present her claim to an EEO counselor within 30 days. See Pet. App. 32a. Although the court agreed with petitioner that the 30-day filing requirement was subject to equitable tolling, it concluded that she had not established any basis for equitable tolling in this case. *Id.* at 33a-36a. In response to petitioner's argument that she was not apprised of the deadline, the court explained that petitioner

> argues that she met with a former EEO counselor who never told her about the thirty day time limit for filing, and that she was "being misled by NIH "higher ups" [*sic*]. These bare allegations do not provide [petitioner] with the necessary showing of such doctrines as waiver, tolling, or estoppel.

Id. at 36a.[5]

4. The court of appeals affirmed. Pet. App. 1a-18a.

a. First, the court considered petitioner's claim that the district court should have granted equitable tolling of the 30-day deadline for consulting an EEO counselor

[5] The district court did not expressly address petitioner's retaliation claim, apparently believing that dismissal of the main claims required dismissal of that claim as well. See Pet. App. 36a (noting that the court had no occasion to consider respondent's alternative defenses to the retaliation claim).

on her claim against Dr. Chase. Pet. App. 5a-9a. The court noted petitioner's statement that she "d[id] not know whether NIH has posted notice of the time limits," *id.* at 6a, but found that statement inadequate to justify equitable tolling, explaining that petitioner did not "claim that any of the original defendants misrepresented the time limits or otherwise misled her," *id.* at 7a. The court concluded that equitable tolling would "requir[e] a diligent search by [petitioner]," because "[o]ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Ibid.* In response to petitioner's contention that the individual she erroneously believed to be an EEO counselor failed to advise her of the deadline, the court noted that petitioner did "not claim that any of the defendants led her to make the assumption that the person was an EEO counselor. Again, HHS should not have to bear the responsibility for mistakes by [petitioner] where it did nothing to mislead her." *Id.* at 8a.

b. The court also rejected petitioner's claim that the deadline on her claim against Dr. Chase should have been extended under 29 C.F.R. 1613.214(a)(4) (1985). Pet. App. 9a. As the court explained, that provision requires an agency to extend the 30-day deadline if "the complainant shows that he was not notified of the time limits and was not otherwise aware of them." Although petitioner contended that she was "not otherwise aware of [the deadline]," it rejected petitioner's claim because she "has failed to demonstrate that the NIH did not post notice of the time limits. She alleges simply that she did not know what was posted and only *believed* that no notice existed." *Ibid.*

c. Finally, the court rejected petitioner's complaint against Dr. Hallett. Pet. App. 9a-10a. The court explained that 29 C.F.R. 1613.262(b) (1985) allowed an individual to request consolidation of an underlying com-

plaint with a complaint for retaliation only if the request is made "within 30 calendar days of occurrence of the act which forms the basis of the allegation." Because the act petitioner complained of was a December 24, 1985, letter, her February 19, 1986, complaint was untimely. Pet. App. 10a. The court rejected petitioner's claim that Dr. Hallett's refusals to alter his December 24 letter could be treated as separate acts of retaliation that restarted the deadline, stating that under such a holding "[a] complainant could easily circumvent the time limit by simply demanding that the perpetrator of the discrimination right the wrong, and, if the person declines, thereby create a second retaliatory action with a fresh thirty day time limit." *Ibid.*

The court of appeals went on to suggest, as an alternative basis for rejecting petitioner's retaliation claim, that "Title VII provides no cause of action against a former employer by an ex-employee for acts of retaliation after the employment has ended." Pet. App. 10a-11a; see *id.* at 10a-16a. The court stated that 42 U.S.C. 2000e-3(a) grants rights only to "employees or applicants for employment" and concluded that extending benefits to former employees would be inconsistent with the statutory language. Pet. App. 11a. The court noted that its view on that question differed from the views expressed by the Second, Tenth, and Eleventh Circuits, but chose to follow the view adopted by the Seventh Circuit in *Reed* v. *Shepard*, 939 F.2d 484 (1991). Pet. App. 12a.

ARGUMENT

1. Petitioner's principal contention (Pet. 17-23) is that the court of appeals erred in holding that Title VII's retaliation provision does not protect former em-

ployees.[6] Petitioner correctly notes that the courts of appeals are divided on the question.[7] The decision of the court of appeals does not, however, provide a suitable occasion for the Court to resolve that division, because the court of appeals' views on that question were offered only as an alternative basis for the judgment, following the court's conclusion that petitioner's retaliation claim was not filed in a timely manner.[8] Even if the court of appeals erred in determining that petitioner's retaliation claim was not actionable under Title VII, it still would have rejected the claim as untimely. Hence, because a resolution of the question in petitioner's favor would not alter the judgment of the court of appeals, there is no

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[6] That contention applies only to petitioner's retaliation claim regarding Dr. Hallett's conduct, not her claim of direct discrimination by Dr. Chase.

[7] Four courts of appeals have held that former employees are covered. See, *e.g.*, *Pantchenko* v. *C.B. Dolge Co.*, 581 F.2d 1052, 1055 (2d Cir. 1978) ("[T]he statute prohibits discrimination related to or arising out of an employment relationship, whether or not the person discriminated against is an employee at the time of the discriminatory conduct."); *O'Brien* v. *Sky Chefs, Inc.*, 670 F.2d 864, 869 (9th Cir. 1982) (reversing dismissal of claims of retaliation based on former employer's giving bad recommendations after termination); *Rutherford* v. *American Bank of Commerce*, 565 F.2d 1162, 1165-1166 (10th Cir. 1977) (concluding that "[t]here is no ground for affording any less protection to * * * former employees than to * * * present employees"); *Bailey* v. *USX Corp.*, 850 F.2d 1506, 1509-1510 (11th Cir. 1988) ("We * * * hold that former employees may sue for retaliation under Title VII."). On the other hand, the Fourth Circuit's contrary conclusion in this case is supported by the similar decision of the Seventh Circuit in *Reed* v. *Shepard*, 939 F.2d 484, 492-493 (1991).

[8] The independent nature of the discussion related to the former-employee issue is evident from the court's opinion, which offered that discussion as a basis for dismissal of the retaliation claim "[r]egardless of the foregoing [rejection of that claim as untimely]." Pet. App. 10a.

basis for the Court to review the question in this case. Cf., *e.g.*, *California* v. *Rooney*, 483 U.S. 307, 311 (1987) ("This Court 'reviews judgments, not statements in opinions.'") (quoting *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956)).[9]

The lack of adversary litigation on the first question presented by petitioner also makes this case an inappropriate vehicle for resolving that question. The parties did not brief or argue the question in the court of appeals; the government argued that petitioner was not entitled to relief on her retaliation claim because it was untimely and because petitioner had failed to offer any reason to believe that Dr. Hallett acted in retaliation for her complaint against Dr. Chase (of which he was

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[9] Petitioner only briefly addresses (Pet. 17 n.6) the court of appeals' holding that her retaliation claim was untimely, arguing that the time for filing should have run from the date she learned of the letter, not from the date the letter was written. That argument apparently was not raised in the court of appeals, where petitioner argued (Pet. C.A. Br. 38-39) that the retaliation claim was timely because it challenged a continuing violation. In any event, the regulation in question required a filing 30 days from the date of "the act which forms the basis of the allegation," 29 C.F.R. 1613.262(b) (1985), not 30 days from the date the plaintiff learned of the act. Petitioner cites no support for her reading of the 1985 regulation. The current regulations do not contain an analogous provision. See 57 Fed. Reg. 12,634 (1992) (recodification of procedures for Title VII claims against federal agencies).

Alternatively, petitioner argues (Pet. 17 n.6) that the court should have treated Dr. Hallett's subsequent refusals to alter the letter as entirely separate acts of retaliation, but she fails to address the court of appeals' concern that acceptance of that view would vitiate the filing deadline entirely. In any event, whatever the merits of petitioner's challenges to that holding, she offers no substantial basis for believing that the holding presents a question that would merit review by this Court. Review of the court of appeals' alternative holding by itself would not alter the judgment of the court of appeals.

unaware when he wrote the letter in question). Gov't C.A. Br. 17-20.[10] Moreover, because the government disagrees with the court of appeals' view that the retaliation provisions of Title VII are entirely inapplicable to former employees, neither party in this case supports the conclusion of the court of appeals on that point. In sum, because the decision of the court of appeals constitutes an alternative ground for decision unnecessary to the result and does not rest on an adversary presentation of the question, there is no reason for this Court to consider the question at this time.

2. Petitioner also contends (Pet. 23-26) that the lower courts erred in concluding that petitioner failed to establish that she "was not notified of the time limits" for presenting her complaint of discrimination by Dr. Chase, as required by 29 C.F.R. 1613.214(a)(4) (1985).[11] At bottom, petitioner's claim is that both of the lower courts erred in concluding, based on the record in this case, that

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[10] Although the petition could be read to suggest (Pet. 19) that the Equal Employment Opportunity Commission (EEOC) filed an amicus brief in support of petitioner's petition for rehearing in the court of appeals, in fact petitioner simply attached to her petition for rehearing a brief filed by the EEOC in a different case; the EEOC did not appear in the court of appeals.

[11] That regulation applies only to petitioner's claim of direct discrimination by Dr. Chase, not to her claim regarding retaliation by Dr. Hallett. As noted above, see note 9, *supra*, petitioner's retaliation claim was found untimely under a different provision of the regulations, 29 C.F.R. 1613.262(b) (1985). That regulation, unlike Section 1613.214, did not require the agency to notify the claimant of the time limits. Moreover, it is clear that petitioner knew of the existence of regulatory time limits before she filed her retaliation complaint, because the EEO counselor discussed them with her when he explained that her complaint against Dr. Chase was untimely. See Pet. App. 3a. Accordingly, the merits of petitioner's second question presented do not undermine the validity of the lower courts' dismissal of her retaliation claim.

petitioner failed to establish a genuine issue of material fact sufficient to survive the government's motion for summary judgment under Fed. R. Civ. P. 56. The pertinent legal standards for awarding summary judgment are, of course, well established and were not misstated by the lower courts here. Whether those standards were misapplied on this record is an inherently factbound question that does not merit plenary review by this Court.[12] After careful consideration, however, it is our belief that the courts below were incorrect in concluding that no genuine issue of material fact existed.

The regulation in question provided that the deadline must be extended if "the complainant shows that he was not notified of the time limits." 29 C.F.R. 1613.214(a)(4) (1985). Petitioner submitted an affidavit stating that she "did not receive any information when I was hired, nor, for that matter, ever see any information to lead me to believe there was a thirty day limit." C.A. App. 580. To rebut petitioner's affidavit, the government introduced an affidavit from NINCDS's EEO officer explaining the government's practice of disseminating detailed posters to notify employees of their rights under Title VII. See note 3, *supra*. That affidavit did not state that the posters contained information related to the time limits for pursuing Title VII claims in this context and did not

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[12] Contrary to petitioner's argument (Pet. 24), the decision below does not conflict with the decision of the District of Columbia Circuit in *Bayer* v. *United States Department of Treasury*, 956 F.2d 330 (1992). As petitioner's own discussion makes clear, the notification requirement was not in dispute in *Bayer*; the government "conceded that it had not notified Bayer of the time limit." Pet. 24 (citing *Bayer*, 956 F.2d at 333). The question in *Bayer* was whether the claimant had satisfied the second requirement of the regulation, that he did not have actual knowledge of the filing requirement. That point is not at issue in this case. See Pet. 25 n.15.

otherwise suggest that petitioner had been notified of the deadline.[13] In those circumstances, petitioner's affidavit was sufficient to establish a genuine issue on the material factual question whether she was notified of the time limits. Accordingly, summary judgment on petitioner's claim of discrimination by Dr. Chase was not appropriate under Federal Rule of Civil Procedure 56(c).

3. Finally, petitioner argues (Pet. 27-29) that the lower courts erred in not excusing her failure to comply with the deadline as a matter of equity, even if she did not satisfy the regulatory tolling requirements set forth in 29 C.F.R. 1613.214(a)(4) (1985). That argument does not merit review by this Court. Both of the lower courts agreed with petitioner that equitable tolling would be available in appropriate circumstances, but concluded that she had offered no basis for equitable tolling in this case. As the court of appeals noted, petitioner has not "claim[ed] that [the respondent] misrepresented the time limits or otherwise misled her." Pet. App. 7a. In the absence of affirmative government misconduct,[14] common-

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[13] Applicable regulations require the agency to "[p]ublicize to all employees and post at all times * * * a notice of the time limits and necessity of contacting [an EEO] Counselor before filing a complaint [under Title VII]." 57 Fed. Reg. 12,647 (1992) (to be codified at 29 C.F.R. 1614.102(b)(6)). In our view, this would be a very different case if the record indicated that the posters included information regarding the 30-day time limit imposed by 29 U.S.C. 1613.214(a)(4) (1985).

[14] Petitioner suggests at one point (Pet. 28 n.17) that the government engaged in misconduct by contending that she should be held accountable for the putative counselor's failure to notify her of the 30-day limit. As the court of appeals pointed out, however, petitioner "does not claim that [the government] led her to make the assumption that the person was an EEO counselor." Pet. App. 8a. In the absence of such a claim, the court of appeals correctly ruled that "HHS should not have to bear the responsibility for mistakes by [petitioner] where it did nothing to mislead her." *Ibid.*

law tolling of a regulatory deadline based on the government's failure to advise a complainant of the deadline for presenting a complaint to an EEO officer should not be available if the complainant fails to satisfy the regulatory provision that expressly offers tolling on that basis.

CONCLUSION

For the reasons we have stated, plenary review is not warranted, but it would be appropriate for the Court summarily to grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of the position set forth in this brief.

Respectfully submitted.

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